

APPEAL NO. 030809
FILED MAY 20, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 28, 2003. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable injury on _____; that the claimant has had disability from April 17, 2002, through the date of the CCH; and that the appellant (carrier) waived its right to contest compensability. The carrier appealed. No response was received from the claimant.

DECISION

Affirmed.

The claimant had the burden to prove that she sustained a compensable injury as defined by Section 401.011(10), and that she had disability as defined by Section 401.011(16). Conflicting evidence was presented on the disputed issues. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's determinations on the issues of compensable injury and disability are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

With regard to the waiver issue, in a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated May 9, 2002, which was received by the Texas Workers' Compensation Commission (Commission) on May 9, 2002, the carrier noted that it first received written notice of the claimant's injury of _____, on April 25, 2002, and it disputed the compensability of the injury.

In Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), the Texas Supreme Court concluded that under Sections 409.021 and 409.022, a carrier that fails to begin payments as required by the 1989 Act or send a notice of refusal to pay within seven days after it receives written notice of injury has not met the statutory requisite to later contest compensability. In the instant case, the carrier's TWCC-21 contesting compensability was not filed with the Commission within seven days after it received written notice of the injury, but was filed with the Commission after the seventh day and before the 60th day after it first received written notice of the injury.

In a recent decision, Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, the Appeals Panel noted that in Downs, the Texas Supreme Court stated that, "Taking some action within seven days is what entitles the carrier to a sixty-day period to investigate or deny compensability." The Appeals Panel

stated that, “to comply with the Supreme Court’s holding in Downs, the carrier has the burden to prove that it ‘took some action within seven days,’ and to present evidence indicating the action taken.” The Appeals Panel went on to state in Appeal No. 030380-s that, “Since the carrier in this case presented no evidence that it took any action indicating that it had accepted the claim or intended to pay benefits within seven days of receiving written notice, we conclude that the hearing officer did not err in determining that the carrier waived its right to dispute compensability of the claimed injury.” In Texas Workers’ Compensation Commission Appeal No. 030663-s, decided May 1, 2003, the Appeals Panel cited Appeal No. 030380-s in determining that the carrier in that case had waived its right to contest compensability, and noted that a carrier cannot simply sit back and rely on the fact that benefits did not accrue prior to the date it filed its dispute and argue that it did not waive its right to contest compensability. In the instant case, there is no evidence that within seven days of receiving written notice of the injury, the carrier took any action indicating that it had accepted the claim or intended to pay benefits. In accordance with our decision in Appeal No. 030380-s, we conclude that in the instant case the hearing officer did not err in determining that the carrier waived its right to contest compensability of the injury.

The carrier asserts that it is inappropriate to retroactively apply the Downs decision. In Texas Workers’ Compensation Commission Appeal No. 021944-s, decided September 11, 2002, the Appeals Panel applied the decision in Downs and noted that, “On August 30, 2002, the Texas Supreme Court denied the carrier’s motion for rehearing, and the Downs decision, along with the requirement to adhere to a seven-day ‘pay or dispute’ provision, is now final.” In subsequent decisions, the Appeals Panel has rejected the contention that the decision in Downs should not be applied retroactively, noting that Commission Advisory 2002-15 (September 12, 2002) provides that, “All previous Advisories issued by the Commission regarding this issue are superceded by this Advisory and the Supreme Court decision.” Texas Workers’ Compensation Commission Appeal No. 022274, decided October 17, 2002, Texas Workers’ Compensation Commission Appeal No. 022582, decided November 25, 2002.

Accordingly, the hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **TRINITY UNIVERSAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**DONALD GENE SOUTHWELL
10000 NORTH CENTRAL EXPRESSWAY
DALLAS, TEXAS 75265.**

Robert W. Potts
Appeals Judge

CONCUR:

Veronica Lopez
Appeals Judge

Edward Vilano
Appeals Judge